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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 875 Misc.

THOMAS N. BURBRIDGE, LILY KOWALSKI, CAROLYN MULLEN, SUSAN CLOKE, MARGOT LIEBERMAN, KENNETH S. KING, ROBERT H. JOHNSON, RICHARD H. MIKESELL, ALLEN W. JOHNSON and ESTHER M. JOHNSON,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On September 7, 1966, the appellate department of the Superior Court of the City and County of San

Francisco entered an order modifying and affirming petitioners' convictions of violating section 407 of the California Penal Code (unlawful assembly), section 409 of the California Penal Code (remaining present at the place of an unlawful assembly after warning to disperse) and section 602(j) of the California Penal Code (trespass).[1] A rehearing was denied on September 19, 1966.

Petitioners applied to the Supreme Court of California for a writ of habeas corpus to review these convictions; that court denied the writ on December 7, 1966.

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether section 407 of the California Penal Code, which prohibits unlawful assembly, is unconstitutionally vague.

2. Whether petitioners were properly convicted of trespass in violation of section 602(j) of the California Penal Code.

3. Whether petitioners were entitled to introduce at their trial evidence to show that they believed that

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[1]These sections are set out in Appendix "A" of this response.

their conduct was reasonable and necessary to the effective exercise of their first amendment rights.

4. Whether the sentences imposed on the petitioners were valid.

STATEMENT OF FACTS

William McDonald testified that the Cadillac Agency, which sells automobiles and of which he is manager, is located in San Francisco.

He stated that on April 11, 1964, a Saturday, five or six cars were on the showroom floor. At approximately 11:00 a.m. a group of demonstrators started to picket in front of the building, singing, chanting, clapping (RT 23). The group grew in size until there were three or four hundred people between 11:30 and 12:00 noon. About noon some broke away and headed south on Van Ness Avenue and later another group headed north (RT 26). He described precautions taken inside the agency in preparation for a possible entry by the demonstrators (RT 25).

The demonstrators continued to chant, shout, sing, and march in front of the building until shortly before 1:00 o'clock when Dr. Burbridge addressed the group (RT 26, 27). About one hundred twenty-five people led by Dr. Burbridge then entered and marched around, making a great deal of noise (RT 28).

Mr. McDonald and Captain John Cassidy of the Police Department asked Dr. Burbridge to quiet the crowd, which he did (RT 29). McDonald then read a prepared statement requesting the people to leave the

premises (RT 30), and Captain Cassidy addressed the group commanding them, in the name of the People of the State of California, to leave, and advising them they would be arrested if they did not do so (RT 33-34). Only ten or fifteen people left. The bulk of the group remained, continuing to march, sing and chant.

Mr. McDonald stated that subsequently arrests were effected over a period of forty-five minutes to an hour. Most of the demonstrators were carried out although a few elected to walk (RT 35, 36). Other demonstrators continued to picket outside the building until closing time. McDonald was concerned as to the safety of his employees in the event of any violence (RT 38), and as to possible damage to the automobiles and the building (RT 39). He testified that the agency was unable to conduct business (RT 40).

McDonald identified photographs taken at the Cadillac Agency that day and he stated they accurately depicted the activity he had observed and about which he had testified (RT 49-53). He further identified a reel of film which he had viewed on two occasions and he said it accurately depicted the events, but that the sequence was not correct (RT 54-56).

Police Officer Thomas J. Dickson testified that on April 11, 1964, he was stationed outside the Cadillac Agency. When he arrived at approximately 11:30 a.m., a large crowd was singing, chanting, clapping their hands and walking back and forth in front of the agency. He said this conduct continued until shortly before 1:00 o'clock (RT 92). He then observed petitioner Burbridge at the top of the front stairs, about

twenty-five feet away, quieting the demonstrators (RT 92). He could hear him clearly. Dr. Burbridge said that all those who felt no harm would come to them by being arrested should join him and walk into the agency. He asked that all those under eighteen years of age remain outside. He told the group to fill out slips of white paper being distributed and hand them to the attorney at the door before entering (RT 94). Officer Dickson stated that he saw the letter-sized papers in the hands of the demonstrators (RT 94). These were later shown to have been bail information sheets (RT 270). Dr. Burbridge also requested those who did not intend to enter to continue demonstrating outside (RT 95).

Dr. Burbridge and the demonstrators then entered the Cadillac Agency handing the white slips to a local attorney known to the officer (RT 95).

Officer Dickson with his partner, followed the demonstrators inside (RT 96). He then heard Mr. McDonald's statement and heard Captain Cassidy inform the demonstrators that they must disperse or be arrested (RT 98). The noise and marching started again. About eight or nine people left the showroom. This occurred at about 1:30 p.m. (RT 99). At approximately 2:00 p.m. a patrol wagon pulled up in front and additional police officers entered the showroom. The arrests commenced, and continued to about 3:40 to 4:00 p.m. (RT 102).

Captain John Cassidy of the San Francisco Police Department testified that he was in charge of the Northern Police District within which the Cadillac

Agency is located. On April 11, 1964, he was on duty and went to the area about 11:00 a.m. His description of the scene paralleled that of Officer Dickson. He stated, however, that after the demonstrators entered the Cadillac Agency, they circled the showroom, led by Dr. Burbridge, and at one point the group went up one stairway and down another in the showroom, the noise continuing during this time (RT 134, 135).

He also stated he heard Dr. Burbridge tell the demonstrators not to resist arrest but that whether they wished to go limp or to walk out was their decision. He described the arrests and how the demonstrators were carried to the patrol wagon. He said most of the demonstrators went limp upon arrest (RT 143).

Captain Cassidy identified a reel of film which he stated accurately portrayed what he saw at the Cadillac Agency on April 11th but not in proper chronological sequence.

On cross-examination, Captain Cassidy said that patrolmen under his supervision stood on the street in front of the Cadillac Agency because there was no room on the sidewalk (RT 158) and the only way one could walk along the sidewalk was to join the line of demonstrators (RT 159).

Officer James Tedesco testified that he was one of the six officers assigned to make the arrests (RT 194). On his arrival he observed approximately one hundred demonstrators marching around inside the agency singing, clapping, chanting and stomping their feet. A large group of pickets was in front of the agency and a group of spectators across the street. The noise

inside was extremely loud and it was difficult for the officers to hear instructions from their commanding officers (RT 195). He described how the arrests were made (RT 197), identified the appellants whom he had arrested (RT 201, 202-208) and stated what each had been doing at the time. He stated they went limp and had to be carried from the premises.

Officer Thomas Childs testified that he arrested Dr. Burbridge who also went limp and had to be carried from the building (RT 231).

Dr. Thomas N. Burbridge testified that when he arrived at the Cadillac Agency a small group of demonstrators was there. He distributed signs to them, and got the lines of the pickets started (RT 239). He acknowledged that he quieted the crowd before they entered the agency and he described the activities of the demonstrators after entering (RT 241). He stated the reason for the demonstration was to point out "to the agency and to the community as a whole that a malicious hiring practice was being practiced by the agency" (RT 256). He stated he did not intend to injure the business or property of the Cadillac Agency, and that, on three prior occasions, he had entered the Cadillac Agency without being arrested (RT 256).

On cross-examination he testified that he, along with a committee, had planned the demonstration as president of the local branch of the NAACP. He stated he asked the demonstrators to follow him into the agency (RT 268) and acknowledged that bail information sheets had been prepared under the auspices of his

organization (RT 270). He said they felt there was a good chance arrests would be made if they went inside, as demonstrators had been arrested on March 14th under similar circumstances. He said he personally was arrested there on that date, the last occasion prior to April 11th when he had been inside the agency (RT 271). He said that when he entered the agency he knew it was private property and that it was open for business (RT 273). He led the group into the agency; they marched around, up and down the stairs and sang and chanted for about fifteen or twenty minutes. He joined the chanting. He said he was in charge and that he approved of what the demonstrators were doing (RT 276). He instructed the group not to resist arrest but did not instruct them to leave (RT 281). He was part of the group that demonstrated between the time of the announcements and the arrests (RT 282). He went limp and was carried from the premises (RT 284).

He testified that he did not intend to interfere with or injure the business of the Cadillac Agency (RT 362), but acknowledged he knew what the demonstrators did both outside and inside could have had some effect on the business (RT 363).

Petitioner Allen Johnson testified that on April 11th he went to the Cadillac Agency and took part in the demonstration there, marching and singing. He went into the agency to protest discrimination in the hiring practices; he marched and sang inside because he felt his protest would be more effective inside even though he realized it was private property and open for

business (RT 295-303). He acknowledged that he heard the request to leave but did not do so, and that he knew by remaining he was subject to arrest (RT 304-305). He stated he did not intend to injure the business of the Cadillac Agency.

Each of the other petitioners testified to substantially the same facts and that their intent was similar to that of appellant Allen Johnson (RT 306-362).

ARGUMENT

I

SECTION 407 OF THE CALIFORNIA PENAL CODE IS NOT UNCONSTITUTIONAL

Petitioners commence their attacks upon the convictions entered against them with the argument that section 407 of the California Penal Code is unconstitutionally vague. Section 407 provides as follows:

> "Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly."

Petitioners' particular challenge to this code section is directed to that portion of it which concerns persons who assemble to do "a lawful act in a violent, boisterous, or tumultuous manner." They urge that this portion of the statute is unconstitutional because it prohibits lawful conduct done in a "violent, boisterous, or tumultuous manner" and that these adjectives could cover a wide spectrum of innocent activity.

They also argue that permission was granted to enter the Cadillac Agency and finally that the section is an overbroad statute regulating freedom of speech. We shall attempt to reply to each of these arguments in turn.

First of all Penal Code section 407 is nothing more than a codification of what has been the common law for hundreds of years. This section was long ago definitively construed by the California Court of Appeals in *People v. Kerrick,* 86 Cal.App. 542, at 551, 261 Pac. 756 (1927).

> "The section of the code to which we have referred seems merely to be a reaffirmation of the common law. In American and English Encyclopedia of Law (second edition), page 344, we read that: 'It is not always necessary that a specific intent of any sort should exist in the minds of the persons assembled in order to constitute the offense, because it is well settled that an assembly of persons attended by circumstances reasonably calculated to excite alarm is an unlawful assembly, regardless of the matter of intent.' The text is supported by authorities from which we select the following: 'There seem to be two modes in which as assembly of persons may become unlawful, so as to be a subject of indictment; one, by the purpose for which it meets, and the other, without regard to its purpose, by the numbers and demeanor of those present at it.' *(Slater v. Wood,* 9 Bosw. (N. Y.) 15.) And in another standard encyclopedia we read that the purpose or intent 'may be formed either before or at the time of assembling, or it may be formed with the agreement of mutual assistance after the assem-

> bling.' This latter manner of expressing it would seem to clarify the situation. It is immaterial at what time the intent to do the lawful act in an unlawful manner is formed—whether prior to or during the assembly. As stated in Wharton's Criminal Law, section 1856, 'a lawful assembly becomes unlawful whenever the members agree to resort to violent and tumultuous measures to achieve even a lawful end.'"

Similarly there is no merit in petitioners' argument that this statute can apply to innocent conduct such as would take place at a baseball game or, according to petitioners, even at a political convention. In *People v. Kerrick, supra,* the court went on to explain that

> "Not every meeting where violent, boisterous, and tumultuous conduct occurs may be denominated an unlawful assembly, even though that be the wording of the statute. It is particularly dangerous in a country where meetings are constantly held for every conceivable purpose, many of them accompanied with much noise and excitement, to lay down such a doctrine. At this time of the year in our country in almost every hamlet, and certainly in every city of any size, contests between the youth of schools and colleges are being staged which could not be characterized as anything other than violent, boisterous, and tumultuous. Yet the communities are not alarmed and the public peace is not endangered. No one would for a moment characterize high school or college football games as unlawful assemblies. The statute was intended to prevent 'any tumultuous disturbances of the public peace

by' two or more persons 'having no avowed, ostensible, legal or constitutional object, assembled under such circumstances, and deporting themselves as to produce danger to the public peace and tranquillity, and which excites terror, alarm and consternation in the neighborhood.' *(In re Charge to Grand Jury,* 4 Pa. L. J. 29) The jury should consider, as we read again in Wharton's Criminal Law, section 1851, 'In determining the question of terror, . . . whether rational and firm men, in charge of families, would have, under the circumstances, cause for anxiety; and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done.'" 86 Cal.App. at 551-552.

Thus, section 407, as interpreted by the California Courts, is restricted to conduct which in addition to being violent, boisterous or tumultuous alarms the community and disturbs the public peace. Thus it cannot be said to vest in law enforcement officials the right to interfere at whim in the lives of citizens. The section does, however, permit action to be taken where the public peace and order is threatened, as it certainly was in this case.

Certainly under the facts of this case petitioners cannot contend that they believed their conduct inside the Cadillac Agency was innocent. Indeed, the evidence shows that they entered the premises with the intention of being arrested. Before the entry was made, petitioner Burbridge addressed the demonstrators and said that all those who felt no harm would come to them by being arrested should join him and

walk into the agency. He asked all those under 18 years of age to remain outside and he told the group to fill out slips of white paper and hand them to the attorney at the door before entering (RT 94). These papers were bail information sheets (RT 270). Thus it is obvious that the petitioners expected to be arrested and they were not entrapped by an overly broad statute.

Petitioners' final attack on section 407 is that it unconstitutionally restricts freedom of speech. This argument, however, is based upon the discredited notion that people who want to propagandize their views have a constitutional right to do so whenever and wherever they please. This argument was squarely repudiated by this Court in *Adderley v. Florida,* 385 U.S. 39, 47-48 (1966).

II

THE EVIDENCE SUPPORTS PETITIONERS' CONVICTIONS OF VIOLATING SECTION 602(j) OF THE PENAL CODE

Section 602(j) of the California Penal Code makes it a misdemeanor to enter any lands whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession:

Petitioners' first argument is that section 602(j) has no application in this case because its purpose was

restricted to the protection of open range land against trespass. The California law, however, is squarely to the contrary. The word "lands", as used in section 602(j), has been judicially interpreted to include buildings and fixtures and it is synonymous with real property. See *People v. Brown,* 236 Cal.App.2d Supp. 915, 47 Cal.Rptr. 662 (1965), and cases cited therein.

Petitioners also urge that they cannot be convicted of trespass because the Cadillac Agency consented to their entry and that their conduct inside the premises was exactly the same as it was outside. Petitioners ignore the fact, however, that after they were inside the premises they sang, shouted, clapped hands and marched around and refused to leave the premises when ordered to do so (RT 28, 134-135). By the very wording of section 602(j), the gist of the offense is not an unconsented to entry, but an entry made with the specific intent of interfering with, obstructing or injuring the lawful business carried on by the owner or occupant of the property. Thus petitioners' argument that the Cadillac Agency may have consented to their entry is an irrelevancy, because the agency obviously did not consent to the disturbance they created inside its premises. Likewise irrelevant is petitioners' argument that what they did inside the agency was similar to their conduct on the street. The essential fact is that once within the premises of the Cadillac Agency, they wilfully conducted themselves in such a manner as to obstruct or interfere with that business. Furthermore any claim by petitioners that they believed their conduct inside the building was

innocent is dissipated by their wilful refusal to honor two requests to leave. Clearly the evidence is sufficient to sustain the violation of section 602(j) of the California Penal Code.

III

PETITIONERS WERE NOT ENTITLED TO INTRODUCE EVIDENCE BEARING ON THEIR BELIEFS THAT THEIR CONDUCT WAS NECESSARY TO THE EFFECTIVE EXERCISE OF THEIR RIGHTS OF FREE SPEECH

Petitioners next argue that they were entitled to introduce evidence as to their beliefs that their conduct on the premises of the Cadillac Agency was necessary to the exercise of their rights of free speech and assembly. Even if the petitioners did hold such beliefs, however, they would not be excused from accountability for their criminal conduct.

This contention of the petitioners is put to rest by the language of this Court in *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Adderley v. Florida, supra*, 385 U.S. 39 (1966). In *Cox v. Louisiana, supra*, this Court stated as follows:

> "The rights of free speech and assembly while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox v. Louisiana, supra*, 379 U.S. at 554.

"We emphatically reject the motion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Id.* at 555.

. . . . . .

"Nothing we have said here or in No. 24, *ante,* is to be interpreted as sanctioning riotous conduct in any form of demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions.

"Liberty can only be exercised in a system of law which safeguards order. We reaffirm the repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society. We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and

responsibility on the part of all citizens to obey all valid laws and regulations." *Id.* at 574.

This doctrine was restated by the Court in *Adderley v. Florida, supra,* as follows:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate. . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox v. Louisiana, supra,* 554-555 and 563-564." 385 U.S. at 47-48.

IV

THE SENTENCES IMPOSED UPON PETITIONERS WERE VALID

Petitioners argue that the sentences imposed upon them were so excessive as to amount to cruel and unusual punishment in violation of the Eighth Amendment of the Constitution.[2]

Sections 407, 409 and 602(j) of the California Penal Code are misdemeanors. No specific punishment is provided. Therefore by virtue of section 19 of the California Penal Code the punishment is imprisonment in the county jail for not more than six months or a fine not exceeding $500 or both. The sentences imposed by the trial court (15 days on each count for the petitioners other than Burbridge) were well within these limits. It is well settled that a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution. *Martin v. United States,* 317 F.2d 753, 755 (9th Cir. 1963); *Pependrea v. United States,* 275 F.2d 325, 329-330 (9th Cir. 1960).

Likewise without merit are petitioners' unspecified claims that the conditions of probation offered to them, and which they refused, were overly broad. They have no standing to raise this point now because they rejected probation. As regards petitioner Burbridge, the point is twice moot in view of the fact that

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[2]Petitioner Thomas N. Burbridge has received a grant of executive clemency setting aside his sentences and thus has no standing to urge that they amount to cruel and unusual punishment. A copy of the order granting clemency is attached to this brief as Appendix "B".

he has received executive clemency. In any event, the terms of probation, set out at page 435 of the reporter's transcript, were no more than that the petitioners should obey all laws, not participate in any unlawful demonstrations and not sit down or go limp if arrested for any lawful cause. These conditions of probation amount to no more than what would be expected of any citizen, whether a probationer or not.

CONCLUSION

We respectfully submit that the petitioners' application for a writ of certiorari should be denied.

Dated, San Francisco, California,
April 4, 1967.

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(Appendices Follow)

Appendix "A"

California Penal Code § 407.

Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

California Penal Code § 409.

Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

California Penal Code § 602(j).

Every person who wilfully commits any trespass by either:

. . . . . .

(j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession; or

. . . . . .

is guilty of a misdemeanor.